

## COVID-19 and the Ruralization of U.S. Criminal Court Systems

*Pamela R. Metzger & Gregory J. Guggenmos*

The COVID-19 pandemic is imposing typically rural practice constraints on the United States' urban and suburban criminal court systems.<sup>1</sup> This “ruralization” of criminal practice offers lawyers, policymakers, and researchers a window into the challenges and opportunities that inhere in rural systems. This is no small matter. For decades, lawmakers, researchers, reformers, and philanthropists have overlooked, undertheorized, and underfunded rural criminal legal systems—and have done so at great peril. Nearly 20 percent of the nation's population lives in nonmetropolitan areas, where the opioid addiction crisis rages. Rural incarceration increasingly drives mass incarceration. The U.S. countryside warehouses the nation's prison populations, and rural pretrial detention rates continue to rise. Indeed, the success of criminal justice reforms depends in part on our ability to address the incarceration crisis in rural America.

Now, the nation's criminal legal systems are paying a new price for our failure to study rural systems. Criminal legal systems of all sizes are scrambling to select, implement, and study “new” distance adaptations that are old hat to rural practitioners. Rural systems have decades of experience navigating criminal practice in a (geographically) distanced environment. Unfortunately, a national failure to research these innovations means that we have missed critical opportunities to learn about what works—and what does not—in distance-constrained criminal practice.

### I. Rural Criminal Legal Systems

Rural court systems are at the forefront of our research and reform agenda at the Deason Criminal Justice Reform Center. We are the only law school research center committed to exploring small, tribal, and rural (STAR) criminal legal systems. Our research and scholarship explores rural criminal process and procedure, with a particular focus on the rural right to counsel and early-stage criminal procedure.<sup>2</sup> We

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<sup>1</sup> When we refer to rural criminal courts, we refer to the legal systems and system actors who provide criminal procedure from arrest to sentencing. Policing and corrections systems constitute their own rural criminal ecosystems, which equally warrant exploration. But because those systems have been broadly covered in the popular media, we use this Essay to address criminal court processes.

<sup>2</sup> See also Andrew L.B. Davies & Alyssa Clark, *Access to Counsel in Local*

convene in-person rural criminal justice summits, virtual research roundtables, and online webinars that engage rural communities and rural legal professionals from all stages of the criminal process and from all areas of the nation. Working with rural practitioners and experts on legal ruralism, we have developed a theoretical framework for analyzing rural criminal legal systems. Eschewing statistical measures of rurality,<sup>3</sup> we use three key operational criteria to distinguish rural criminal legal systems from their urban and suburban counterparts:

- **Distance:** Geographic isolation that precludes ready access to criminal legal agencies and resources,
- **Scale:** Caseloads and budgets that are too small to support local best practices, and
- **Scarcity:** Criminal law professionals are too few to meet local needs.

Of these characteristics, distance is the one that COVID-19 has made most relevant to urban and suburban systems.<sup>4</sup>

Rural justice communities operate across vast distances, often with harsh terrains or crumbling infrastructures. These distances create operational and opportunity costs for rural criminal court systems. Victims—especially victims of interpersonal violence—may be unable to reach distant shelters. Defendants with suspended licenses or unreliable transportation struggle to get to court across long distances. Rural residents may be many miles away from criminal-adjacent

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*Courts in Rural New York State*, 17 NYSBA Gov. Law & Pol' J. 15 (2018).

<sup>3</sup> It can be challenging to define rurality. *See, e.g.*, Ruth Igielnik Wieder, *Evaluating what makes a U.S. community urban, suburban or rural*, Pew Research Ctr. (Nov. 22, 2019). Of course, many places can be intuitively categorized as rural or not: Los Angeles County is as unquestionably urban as Garfield County, Montana is rural. But elsewhere, judging whether an area is urban, suburban, or rural is a complex task. Government and nonprofit agencies define rural areas by measuring a combination of factors such as population size, population density, and proximity to large metro areas. One such metric is the Rural-Urban Continuum Codes (RUCC), which is used by the U.S. Department of Agriculture (USDA). The RUCC divides counties into nine categories, capturing a rural-urban spectrum. However, criminal legal systems often cross the geographic boundaries that these statistical measures describe.

<sup>4</sup> Through budget shortfalls, backlogs, and coronavirus infections, urban and suburban systems have also experienced challenges that replicate rural experiences associated with small scale and lawyer scarcity. Those issues are beyond the scope of this brief Essay.

services, such as mental health and substance use disorder treatment. Yet, there are few, if any, public transportation options. Lawyers may travel hundreds of miles to investigate cases, interview witnesses, or visit clients in jail.

Across long distances with sparse populations, rural caseloads may be too low to justify full-time court staff—or even a dedicated court building. Rural criminal courts rarely operate on a 9-to-5 work week schedule, much less the 24-7 timetable that is common in large urban areas. Specialty and problem-solving courts are rare, as are the alternatives to pretrial detention that are flourishing in metropolitan communities. In rural lawyer deserts—areas with few or no lawyers—there are dire shortages of experienced criminal lawyers, and full-time prosecutors, public defenders, and judges are in scant supply.<sup>5</sup> Stretched thin by their travel obligations, circuit-riding judges may convene court only weekly—or even less frequently—in the courthouses they serve. These infrequent court sittings can produce extraordinarily long delays in initial appearances, bail hearings, and trials. Some rural systems with access to broadband technology have attempted to address this issue with video communication. But others are backlogged.

## II. COVID-19 and the “Ruralization” of U.S. Criminal Legal Systems.

At the time of this writing, COVID-19 has wreaked havoc on all aspects of the criminal process, from policing to corrections and reentry. COVID-19’s most direct impact on the criminal justice system arises from the necessity of physical distancing. Public health officials encourage people to avoid three Cs: “closed or poorly ventilated areas, crowded spaces and close contact, including close-range conversations.” But the criminal legal process traditionally depends heavily on spatial relationships and physical engagement that defy those precautions.

From crowded jails to jury rooms, and from attorney-client meetings and prosecutorial witness interviews to the face-to-face confrontations and jury deliberations that are the hallmark of our adversary system, the U.S. criminal legal system is built on close interpersonal contacts. We highlight below some common challenges of COVID-19 distancing in the criminal legal process that replicate the distance-based

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<sup>5</sup> There are also notable shortages of professionals who provide social, medical, and therapeutic services often associated with the criminal justice system.

challenges that rural areas routinely confront. To illustrate the importance of studying rural criminal legal systems, we comment on rural communities' pre-pandemic experiences with distance, describe urban and suburban pandemic responses, and highlight how rural experiences can guide practice improvements in all jurisdictions.

#### A. Inadequate Courthouse Space

Because of the pandemic, many otherwise serviceable courthouses are structurally incapable of accommodating COVID-19 precautions. Where criminal courts are reopening, only the largest courtrooms are available for jury trials or hearings. For example, when court opened in June 2020 in Hennepin County (Minnesota's most populous jurisdiction), only four of its thirty-two courtrooms could accommodate jury trials. In Champaign County, Illinois (part of the Champaign–Urbana, Metropolitan Statistical Area), the courthouse has only three courtrooms large enough for socially distanced jury trials. When the building reaches capacity, people wait outdoors, in newly erected tents, to enter the space-constrained courthouse.

In smaller courthouses with cramped courtrooms, “narrow hallways and waiting rooms, small elevators, and shared bathrooms,” it may be impossible to retrofit spaces for COVID-19 distances. As a result, some jurisdictions are no longer bringing incarcerated defendants to court or allowing defendants on pretrial release to appear in person. Others are putting jury trials on hold, postponing pretrial and sentence proceedings, or moving these procedures online. Many jurisdictions are searching for alternative court venues, such as “universities, schools, and movie theaters” and other spaces that can accommodate the cautionary distancing associated with COVID-19.

Neither space constraints nor structural inadequacies are new to rural courts. Many rural courts have only one courtroom, and judges negotiate—or even compete—for courtroom access. In many places, judges, prosecutors, defenders, clerks, and sheriffs share cramped spaces. Elsewhere rural courts are in great disrepair, with inadequate ventilation and too few accommodations for new technologies. In some rural criminal court systems, facilities are so limited that courts lean on their local communities, convening hearings and trials in private venues “ranging from gymnasias and fire stations to garages” and community centers.

Perhaps because they have experience adapting to space constraints, rural criminal courts have been among the first to innovate alternatives to distancing constraints. For example, consider

Montana's remote Kootenai Valley, where, in May 2020, Lincoln County (population 19,980) booked the Libby Middle High School gymnasium to hold a mid-pandemic criminal jury trial. By contrast, jury trials in Missoula, one of Montana's most populous counties, did not resume until early July 2020. Or compare Wisconsin's most urban county, Milwaukee (population 945,726), with one of its most rural counties, Bayfield (population 15,036). The pandemic closed Wisconsin courts in late March 2020. Just two months later, Bayfield County used a high school gymnasium to conduct the state's first socially distanced criminal jury selection. Meanwhile, Milwaukee County was still considering COVID-19 emergency plans that might employ alternative locations.

Bayfield is a classic rural criminal justice system. It struggles with budget shortfalls, long delays in court proceedings, and dire lawyer shortages. So why was Bayfield able to move so much faster than Milwaukee? Perhaps Bayfield's success comes from the nature of rural legal practice, where close acquaintanceships "between the court, its staff, the attorneys, and the public" create "familiarity [that] generally promotes flexibility." Might rural resource constraints have forced rural court judges and administrators to develop innovation "habits" that helped rural legal systems adapt to the COVID-19 crisis? Or perhaps rural criminal courts, which lack large bureaucracies, benefit from smaller, more nimble administration? Or do they rely on existing social capital to resolve problems? Unfortunately, there has been little research or scholarship that answers these questions. Yet understanding how rural courts like Bayfield function might have helped urban and suburban jurisdictions move swiftly to alternate court forums.<sup>6</sup>

## B. Changing Criminal Court Operations

As criminal court proceedings move forward, lawyers and judges must navigate the challenges of social distance while providing defendants with their constitutional rights to counsel, confrontation, compulsory process, and trial by jury and honoring any victim rights recognized by state constitutions. Here again, rural jurisdictions have significant experience adapting their court operations to the constraints of distance. And, knowingly or not, suburban and urban jurisdictions are following in their footsteps.

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<sup>6</sup> Of course, some urban courts have also made swift transitions. Our argument is not that rural places have a monopoly on distance innovations, but that they have decades of experiences in managing distance.

To reduce the challenges of transporting criminal defendants across long distances, many rural jurisdictions have adopted flexible venue rules allowing judges in one venue to hear cases from another venue. Because of concerns about transporting prisoners during COVID-19, the Florida Supreme Court has entered emergency orders empowering circuit court judges to act on out-of-jurisdiction cases of detained criminal defendants. To minimize travel hardships, rural jurisdictions have also allowed a wide range of remote proceedings. For example, Arizona's criminal procedure rules allow criminal defendants who live more than 100 miles from court to enter their guilty pleas over the telephone.

In places where rural criminal courts have had access to broadband, they have long used video technology for pretrial proceedings.<sup>7</sup> For example, in some of Nevada's rural counties, the arrival of broadband allowed local court systems to supply court interpreters via video. New York state providers of mental health and substance use treatment have long worked with rural courts to provide remote teleservices. And video court hearings are common among the rural practitioners with whom we work.

Sadly, most of these rural innovations have not been studied.<sup>8</sup> As a result, urban and suburban areas are rushing to implement what are essentially untested methods for providing constitutional criminal rights. Although telephonic and video court proceedings are not new to urban areas, COVID-19 has dramatically accelerated their adoption. In some instances, courts have extended previously rural-only practices to courts statewide. In Arizona, the Supreme Court has expanded to allow all defendants to enter telephonic guilty pleas. Similarly, before the pandemic, rural Graham County, Arizona (population 38,837) used telehealth providers to restore mentally ill defendants to legal competence. Now, an Arizona Supreme Court working group on COVID-19 and court operations is recommending that *all* courts consider telepsychiatry to treat incompetent criminal defendants. Elsewhere, courts have moved all of their proceedings—including jury trials—online.

But how well do telephonic and video courts work? Can a video allocation guarantee a knowing, intelligent, and voluntary guilty plea? Do competency restorations conducted by video really prepare a

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<sup>7</sup> Elsewhere, the digital divide has made it impossible for rural courts to rely on this adaptation. Twenty-two percent of rural residents lack reliable access to broadband service.

<sup>8</sup> Urban video courts are similarly under-investigated.

defendant to understand their constitutional rights and mount their own defense? What are the impacts of witness testimony when it is mediated through technology? The jury, so to speak, is still out. Nowhere is this knowledge deficit more apparent than in the use of videoconferencing to conduct court proceedings. Courts across the country have turned to videoconferencing to mitigate the slowdown in court proceedings, even conducting virtual hearings and trials. The lack of research on how video courts change outcomes for defendants is particularly problematic. The only sizable empirical study on pretrial video court proceedings addresses the use of video court in bail proceedings in Chicago. There, researchers found that, controlling for all other factors, defendants who appeared via video were subject to much higher bail amounts. Have rural video bail proceedings produced similar results? Alas, no one knows. Two decades of experimentation in rural areas have been unexamined by researchers.

### C. Other Adaptations to Legal Practice

A look at attorney practice similarly reveals the cost of ignoring rural legal norms. COVID-19 means that urban and suburban prosecutors as well as criminal defense attorneys must find socially distanced ways to investigate cases, interview witnesses, litigate motions, negotiate plea bargains, and prepare for trial. As social distancing measures lockdown jails and shutter courthouse doors, metropolitan lawyers no longer enjoy relatively easy access to courts, witnesses, and clients. Instead, they have the same choices that rural lawyers do: they can write letters, make phone calls, or set up video conference meetings. Criminal defense lawyers confront the additional challenge of honoring the Sixth Amendment right to counsel while working remotely. This is a new challenge for many city and suburban attorneys, particularly public defenders.

But distance-constrained practice is not new to rural prosecutors and defense attorneys. Many rural criminal defense providers—public defenders, private attorneys, and appointed counsel—advise their incarcerated clients by telephone or video link. Many rural prosecutors prepare their witnesses online. Those attorneys have a wealth of experience, both good and bad, that can guide lawyers who are new to this form of communication.

During recent Deason Center COVID-19 roundtables with criminal law practitioners and researchers, we were struck by how many rural lawyers described video conferencing as a key component of their pre-pandemic practices. In many instances, these rural practitioners found themselves teaching their urban and suburban colleagues about video practice. They had developed informal norms about which procedures

required in-person meetings and which could be handled online. They had also identified important hazards associated with video practice. But scholars and researchers have never examined their two decades of rural experimentation with video practice.

### **Conclusion: The Way Forward**

For decades, rural criminal legal systems have adapted to the challenges of geographic distance (along with small caseload volumes, and professional scarcity). Now, the COVID-19 pandemic is forcing urban and suburban criminal systems to adapt to social distancing. There are strong indications that some of these COVID-19 adaptations will outlive the pandemic. Because those adaptations are impacting urban and suburban criminal systems, there is already a clamor for research into their fairness and accuracy.

Rapid implementation of successful rural adaptations to distancing could have been the key to early management of the pandemic in urban and suburban courts. But we have missed that opportunity. Careful avoidance of unsuccessful or maladaptive rural responses could have smoothed the urban transition to distance-based practice. That opportunity was also lost.

We do not pretend that rural systems have all the answers to distanced practice, or that all rural adaptations will prove to be successful. What we argue instead is that our hyper-focus on urban criminal justice is misplaced and our national failure to study and fund rural innovation is a self-inflicted wound for our national criminal legal system.<sup>9</sup> We concede that urban and rural areas do not offer perfectly parallel environments for criminal law policy and practice. Urban and suburban solutions must be tailored to the volume and diversity of criminal cases in densely populated environments. But this should not prevent serious and careful consideration of how rural criminal practice and reform can inform practice nationwide.

COVID-19 has set the stage for a post-pandemic investment and engagement in rural criminal law communities. As we bring the pandemic to heel, suburban and urban stakeholders must engage with rural communities. Researchers and reformers should explore and invest in rural systems. Our national criminal legal reform movement must lean into collaboration, experimentation, and data-driven reform in rural criminal systems.

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<sup>9</sup> It is also patently unjust.



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*Pamela Metzger is the Director of the Deason Criminal Justice Reform Center at the SMU Dedman School of Law. A nationally recognized Sixth Amendment and ethics scholar, Professor Metzger's scholarship combines theory and practice in seeking improvements in criminal justice. Professor Metzger's work has appeared in publications such as the Yale Law Journal, Vanderbilt Law Review, Southern California Law Review, and Northwestern University Law Review, and has been widely cited by leading authorities and by the U.S. Supreme Court.*

*Greg Guggenmos provides the Deason Center with statistical consultation and research support. He graduated Phi Beta Kappa from SMU with a B.S. and M.S. in Applied Statistics and Data Analytics. During his time at SMU, he conducted independent research on pretrial detention in New York, Chicago, and Boston and studied abroad in five countries. Deeply invested in civic engagement, Guggenmos founded the Community Bail Fund of North Texas in 2018. In 2019, he served as the Deason Center's Law & Statistics Coordinator, providing the Deason Center with statistical consultation and research support.*